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Supreme Court of the United States

No. 278

OCTOBER TERM, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

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The government first argues that personal notes of a government agent which are not communicated to anyone are not within the reach of 18 U.S.C. 3500.

The record does not reflect that the notes of Agent Rudd were not communicated nor that such notes were not just as much a part of the government files as was the case report. Certainly, the denial of production by the trial judge of such notes was not upon such ground but solely upon the ground that the notes "may involve

many things." (R-93). It is likewise interesting to note that the original indictment was filed on October 18, 1955 (R-1). The case report of Agent Rudd is dated October 31, 1955 (R-138). We think it only fair to all concerned to assume that Agent Rudd communicated with his superiors and with the United States Attorney prior to the indictment being returned. We think it likewise fair to assume that such communications were predicated, to some extent at least, upon the contemporaneous notes of Agent Rudd. Lastly, we think it fair to state that the assumption of the government that the notes of Rudd were not communicated to any one cannot be sustained in the face of this record.

However, even assuming that the notes of Agent Rudd were not communicated to any one, it is the petitioner's contention that such notes are producible under 18 U.S.C. 3500. Insofar as 18 U.S.C. 3500 is concerned the factor of communication is important only to the extent that by virtue of the communication a statement comes into the possession of an agent of the government and thereby becomes subject to a possible claim of privilege. If the statement sought to be produced is the statement of a government agent such statement is already subject to a possible claim of privilege and the factor of communication is of no significance. The important factor to always be considered is that if a witness has made, at a time when his memory was fresher and more accurate, a recordation of the events about which he has now testified, such recordation should be produced for use in cross examining such witness. If by cross examination it is shown that such recordation does not jibe with the present testimony of the witness, the obvious inference is that the present testimony is incorrect. Thus

is served both the interest of the United States and the defendant in seeing that the truth is ascertained.

It was not the intention of Congress in adopting 18 U.S.C. 3500 to deny to defendants any of their constitutional rights. The primary concern of the act is with regulating and limiting defendants' access to government papers. **Palermo v. U. S., 360 U.S. at 354.** Whether the notes of an agent are communicated to any one or not such notes are government papers. The interest of Congress in regulating defense access to such notes would be the same whether the notes are communicated or not. It would be highly destructive of the congressional objective of regulating defense access to government papers to say that 18 U.S.C. 3500 does not apply to non-communicated notes of an agent. Under such an argument the government would be denied the protection afforded by 18 U.S.C. 3500 and the agent could be required to turn over directly to the defendant all of his notes in the manner prescribed by **Jencks v. United States, 353 U.S. 657.**

The petitioner submits that it was the intent of Congress that 18 U.S.C. 3500 encompass the notes, communicated or not, of a government agent and that the specific wording of 18 U.S.C. 3500 does embrace such notes.

The government presents as a basis for its attempted distinction between communicated and non-communicated notes the argument that the notes of an agent may be difficult to decipher. Such is obviously no basis for denying **production** of the notes. The **usefulness** of the notes in cross examination can only be determined by counsel for the defense after the notes have been produced. Cf.

Jencks v. U.S., 353 U.S. at 668. Under 18 U.S.C. 3500 if the notes pertain to the subject matter testified to by the witness and are fairly attributable to the witness they must be produced. The notes are then delivered to the defense unless the government interposes a claim that the notes contain matter which does not relate to the subject matter of the testimony of the witness. All that a defendant need show for production purposes is that the witness made a prior statement concerning the subject matter of his testimony. The defendant is thereupon entitled to the production of such prior statement in order that he may determine its usefulness in cross examination. Such was the law established by **Jencks v. U.S., 353 U.S. 657.** Such continues to be the law under 18 U.S.C. 3500, with the congressional purpose of protecting investigative secrets accomplished by the procedures set forth in the statute. As stated in **Jencks v. U.S., 353 U.S.,** at 669,

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross examination, are established when the reports are shown to relate to the testimony of the witness."

It is no more necessary for the defense to make a preliminary showing that the notes of an agent will be intelligible and useful for cross examination than it is for the defense to make a preliminary showing that a conflict exists between the notes and the testimony of the agent. The requirement of a preliminary showing of conflict was rejected in **Jencks v. U.S.** The argument of the government for a preliminary showing of usefulness on cross examination must likewise be rejected. It

may be noted that an agent could very well communicate his report to his superior in a code adopted by them. Yet we do not understand the government to contend that the adoption of such code would prevent the production of the report.

The government argues that the rule of discretion announced in **Goldman v. U.S.**, 316 U.S. 129 for materials used to refresh recollection was not overruled by **Jencks v. U.S.** The government argues, on page 34 of its brief, that recollection may be refreshed by all sorts of documents not necessarily attributible to the witness. Perhaps some discretion does remain in the trial judge where the document used to refresh memory was not prepared by the witness. However, it is the petitioner's position that the broad holding of **Jencks v. U.S.** is that if the witness is the author of the document and if the document relates to the subject matter of the witness's testimony, the defendant is entitled to production of such document. 18 U.S.C. 3500 has not lessened the right but has merely provided procedural safeguards for the government's benefit.

It is to be noted that in **Goldman v. U.S.**, supra, this Court was undoubtedly concerned with the protection of government files from disclosure to the defendant. As noted by the Court:

> " . . . Where, as here, they are not only the witness's notes but are also part of the government's files, a large discretion must be allowed the trial judge."

Thus, the discretion allowed to the trial judge arose

by virtue of the fact that government papers were involved. In **Goldman v. U.S.** production was sought solely upon the basis that the witnesses had refreshed their memories from their notes. In **Jencks v. U.S.** production was allowed because the witness was the author of a document relevant to his testimony. The fact that government papers were involved was of no importance after the witness had testified. **Jencks** overruled **Goldman** to the extent that where the witness has made a prior statement relevant to this testimony the defendant is entitled to production of such statement as a matter of right, and the fact that the witness does not refer to such statement while testifying does not diminish that right. To the extent that the document sought to be produced is not attributible to the witness, **Jencks** has no application.

In the case at bar the witness Rudd prepared contemporaneous notes during his investigation. He then testified as to his investigation. Without more, the defendant would be entitled to notes under **Jencks v. United States.** The fact that the witness used the notes to refresh his memory served only to more firmly establish that such notes are relevant and fairly attributible to the witness.

The final argument of the government is that the error of the trial court was not prejudical. The basis for this argument is the unwarranted assumption by the government that the notes of Rudd contain the same information as the so-called case report. The case report, prepared some two weeks after the indictment was returned, appears to be more of a trial brief of testimony to be presented by the government to the jury than a contemporaneous recording of events. The value to the

defendant in being able to point out, on cross examination, the deletions and additions, if any, from the original notes cannot be overestimated. Be that as it may, the simple fact remains that the notes were not produced. This Court does not have the notes before it and is unable to examine them. This Court cannot say that the petitioner was possessed of the same information as he would have been had error not been committed. The error cannot be characterized as harmless.

Respectfully submitted

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By Herbert A. Warren Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 5 copies of the foregoing Reply Brief of Petitioner were mailed to the Solicitor General, Department of Justice, Washington 25, D. C. this 20 day of April, 1960 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

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No. 275

OCTOBER TERM, 1959

HARRY NEEDLEMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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Supreme Court of the United States

No. 278

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HARRY NEEDLEMAN,

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UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

The petitioner respectfully petitions the Court to grant a rehearing of its Order entered in this cause May 16, 1960 dismissing the writ of certiorari as improvidently granted.

BASIC FACTS

In his petition for certiorari the petitioner tendered to the Court questions pertaining to the production of the contemporaneous notes of a government agent made during the course of his investigation and used by such gov-

ernment agent before testifying to refresh his recollection. The writ of certiorari was granted by this Court on October 12, 1959. Briefs were filed by the respective parties and oral argument had before the Court. On May 16, 1960 the Court entered its Order dismissing the writ as improvidently granted.

REASONS FOR GRANTING PETITION FOR HEARING

I

This Court has ruled that the writ of certiorari issued in this cause should be dismissed as improvidently granted. This ruling is predicated upon the Court's conclusion that the record does not adequately present the questions tendered in the petition. Such a ruling presents an intervening circumstance of substantial effect which should be considered on rehearing.

This Court has observed the practice that once certiorari has been granted a case should be disposed of on the premise that it is properly before the Court, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted. **The Monorosa v. Carbon Black Export, Inc., 359 U. S. 180; Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521, 559 (separate opinion).**

It is the petitioner's contention that all pertinent portions of the record were set forth in the petition, and that no considerations concerning the adequacy of the record appeared after the granting of the writ of certiorari which were not manifest at the time the writ was granted.

In the petition for certiorari the petitioner set forth the pre-trial motion for the production of the notes of Agent Rudd (Pet. 3), the statement of the Court made during the trial denying the request for the notes (Pet. 3), and the opinion of the Court of Appeals (Pet. App. "A"). The government, in its brief in opposition to the petition, set forth the interrogation of Agent Rudd as to the preparation and use of his notes (Govn. Brief—7), the fact that there was apparently a conversation, not reported, between counsel and the trial judge out of the presence of the jury, after which the trial judge made his statement denying the request for the notes (Govn. Brief—8); that the case report of Agent Rudd was handed to counsel for the petitioner (Govn. Brief—8). The government set forth the contents of the case report (Govn. Brief 8-9). The petition for certiorari and the brief of government in opposition thereto set forth every pertinent portion of the record pertaining to the production of the notes. Subsequent proceedings have not produced any matters which in any way varied or contradicted the record as set forth in the initial application. Since the record was adequate for the granting of the writ and since all matters pertaining to the production of the notes appeared in the initial petition and the brief in opposition, the writ should not now be dismissed as improvidently granted.

This is not a case where a consideration present in the record is brought into "proper focus" on oral argument, **cf. The Monrosa v. Carbon Black Export, Inc., supra**; nor is this, in view of the Court of Appeals specific ruling upon the questions as tendered by the petition for certiorari, a case where closer scrutiny of the record made it doubtful if the lower court passed upon the question. **cf. U.S. v. Rimer, 220 U.S. 547**; nor is there any provision

in the record as to which this Court was not apprised at the time of the granting of the writ. **cf. Furness, Withy & Co. v. Yang Tsze Insurance Assn., 242 U.S. 430**; nor could there have been any misconception of the parties as to the state of the record **cf. Tyrrell v. District of Columbia, 243 U.S. 1**; nor does the record now reflect that the questions tendered were not considered by the District Court and the Court of Appeals, **cf. McCullough v. Kammerer, 323 U.S. 327**; nor does this Court now find a lack of prejudice to the petitioner, **cf. Goins v. United States, 306 U.S. 622.** The dismissal in this case is solely upon the ground of the inadequacy of the record to present the questions tendered.

The petitioner can find no reported instance where this Court has dismissed a writ of certiorari to a Circuit Court of Appeals as improvidently granted upon the ground that the record was inadequate to present the questions tendered, where all relevant portions of the record pertaining to the questions were before the Court at the time the writ was granted. Nor can petitioner find any instance where this Court dismissed a writ, upon the ground of inadequacy of the record to present the questions tendered, where the Court of Appeals had so specifically considered the questions tendered as in this case.

The record was adequate for the Court of Appeals to specifically decide the questions now presented by the petitioner. The record was adequate for the granting of the writ. Subsequent proceedings have produced nothing that was not before the Court when the writ was granted. The petitioner respectfully submits that the Court should grant a rehearing in this cause and should determine this cause upon the merits.

II

In ruling that the record is inadequate to present the questions tendered, this Court evidently determined that there was some deficiency in the record with reference to the trial procedure in requesting the production of the notes of the Agent Rudd and the ruling of the Court thereon. This ruling is an intervening circumstance of substantial effect which should be considered on rehearing because of the fact that no question was raised by the government as to adequacy of the record and petitioner has not had the occasion for fully briefing such question and presenting his argument with respect thereto.

The government raised no issue as to adequacy of the record in its Brief in Opposition to the petition nor in its brief upon the merits. The writ was granted upon the petition and the brief in opposition, which together set forth all pertinent portions of the record. The record had been adequate for the Court of Appeals to pass upon the questions now tendered by the petitioner; the record had been adquate for the granting of the writ by this Court, the adequacy of the record was not questioned by the government. Under such circumstances the petitioner did not include in his brief any argument with respect to the adequacy of the record. Indeed, the petitioner would have been subject to criticism had he devoted any portion of his brief to argument upon a matter which was not in controversy. The provisions of the record were discussed at oral argument, but such cannot serve as a substitute for an exhaustive written brief.

The petitioner submits that this Court should grant a rehearing in this cause, particularly with respect to the

adequacy of the record, and should afford to the parties the opportunity to submit additional briefs restricted to the question of the adequacy of the record to present the questions tendered.

III

The petitioner submits that, in view of the ruling of the Court that the record is inadequate to present the questions tendered, this court should grant a rehearing in the exercise of the Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts, **cf. Marshall v. United States, 360 U.S. 310, 313.** The ruling by this Court that the record is inadequate raises a question as to the proper procedure which must be followed by defense counsel in preserving for appellate review any point pertaining to the production of statements of government witnesses under 18 U.S. C. 3500. This question is of great importance in the everyday practice of criminal law in the federal courts and should be considered and answered. It is a substantial ground available to the petitioner, although not previously presented. The petitioner contends that the procedure in the trial court in this case was as adequate to present the question of the court's error as that followed by defense counsel in **Jencks v. United States, 353 U.S. 657; Holmes v. United States, 271 F. 2d 635 (C.A. 4); and Bradford v. United States, 271 F. 2d 58 (C.A. 9).** Likewise, the crucial importance of the notes of the Agent Rudd in affording to the petitioner an opportunity of showing whether the agent Rudd was telling the truth as to statements attributed by him to the petitioner (see direct conflict between testimony of petitioner and Rudd appearing at R 57 and 122) raises the question of the ap-

plicability of the "plain error" provision of Rule 52 (b) of the Federal Rules of Criminal Procedure.[1] A definitive statement is needed as to the lengths defense counsel must go in making a record to show error under 18 U.S.C. 3500. A rehearing should be granted to consider such question.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Order of this Court dismissing the writ as improvidently granted be reheard and vacated and that upon further consideration upon the writ, the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER

BY

Attorney for Petitioner

[1]Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

CERTIFICATE OF COUNSEL

The undersigned, HERBERT A. WARREN, JR., one of the attorneys for the petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 and that said petition is not interposed for delay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 5 copies of the foregoing Petition for Rehearing were mailed to the Solicitor General, Department of Justice, Washington 25, D.C. this____ day of June, 1960 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General Department of Justice, Washington 25, D.C.

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